71-1658

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No.

SEABOARD COAST LINE RAILROAD COMPANY,
a foreign corporation, *Petitioner,*

vs.

RAYMOND L. MCDANIEL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT STATE OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT STATE OF FLORIDA

Petitioner[1] prays that a Writ of Certiorari issue to review the Judgment of the District Court of Appeal, First District, State of Florida, entered in this cause on October 21, 1971 and rendered on November 18, 1971.

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[1]Petitioner was Defendant in the trial court and Appellant in the District Court of Appeal, First District, below.

CITATIONS TO OPINIONS BELOW

The Opinion and Judgment of the District Court of Appeal, First District, State of Florida, dated October 21, 1971, and rendered on November 18, 1971, and here sought to be reviewed, is printed in Appendix M hereto and is reported at 254 So.2d 15. The Final Judgment of the Circuit Court of the Fourth Judicial Circuit, In and For Duval County, Florida, dated July 1, 1970, which was affirmed by the Judgment here sought to be reviewed, is printed in Appendix J hereto and is not reported. The Order of the Supreme Court of Florida, dated March 24, 1972, denying a Petition for a Writ of Certiorari to review the Judgment of the District Court of Appeal, First District, State of Florida, is printed in Appendix O hereto and is reported at 260 So.2d 517.

JURISDICTION

The Judgment of the District Court of Appeal, First District, State of Florida, was dated October 21, 1971 and rendered on November 18, 1971. Thereafter, in an effort to exhaust all possible state court remedies, Petitioner timely filed a petition for a writ of certiorari to the Supreme Court of Florida seeking the review of the Judgment of the District Court of Appeal, First District. The Supreme Court of Florida denied the petition for a writ of certiorari on March 24, 1972. (260 So.2d 517, Appendix O hereto).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

Raymond L. McDaniel, the Respondent herein, brought this suit in the Circuit Court of Dade County, Florida, under the Federal Employers' Liability Act (FELA) 45 U.S.C. §§51-60 and the Boiler Inspection Act and Safety Appliance Act, 45

U.S.C. §§ 1-51. At the Petitioner's request the case was transferred to the Circuit Court of Duval County, Florida. Plaintiff charged the Defendant with negligence with regard to an accident occurring on September 6, 1967 and with a violation of the Boiler Inspection Act and Safety Appliance Act in connection with an accident which occurred on July 31, 1968. Petitioner filed its Answer denying the allegations of the Complaint, and alleging that, as to the Plaintiff's claim under the Federal Employers' Liability Act, the Plaintiff was guilty of negligence contributing in whole or in part to his injuries and to the extent that his negligence contributed or resulted in part in his injuries, Plaintiff's damages should be diminished in accordance with the degree of negligence attributable to him. The trial court directed a verdict against Petitioner as to the question of Plaintiff's contributory negligence. Petitioner contended that the issue of the Plaintiff's contributory negligence was one for the jury's consideration, based upon interpretations of the FELA by Federal courts and other state courts, and the trial court overruled Petitioner's contentions in that regard. On appeal to the District Court of Appeal of Florida, First District, that Court affirmed the lower court and recognized the argument Petitioner set forth, but failed to apply that law to the facts of the case and in fact failed to agree that such was the law. The Court merely stated as follows:

> "Appellant argues strenuously that the same standards of negligence and causal relationships applicable to support a claim of railroad liability under the Federal Employers' Liability Act apply in the consideration of the employee-plaintiff's contributory negligence. . . . In short, Appellant argues that since the decisions construing the liability of the railroad in FELA cases require minimal proof of actionable negligence on the part of the employer, a like standard must be utilized

> in evaluating evidence of contributory negligence on the part of the injured employee."
>
> 254 So.2d at 16; Appendix M hereto, p. 30a.

After failing to recognize which standard was to be applied, the Court nevertheless proceeded to evaluate the evidence, obviously under Florida common law.

Furthermore, Petitioner expressly asserted at the trial that the Federal Employers' Liability Act precluded the application of the Florida Standard Jury Instructions and common law to a suit brought under the Act. The evidence affirmatively showed that Respondent was suffering from mental and emotional problems which were the cause of his condition and his continuing disability, and the trial court instructed the jury with a Florida Standard Jury Instruction rather than an instruction based upon interpretation of the FELA by Federal courts and other state courts. On appeal to the District Court of Appeal of Florida, First District, that court in affirming the lower court in the giving of the Florida Standard Jury Instruction, stated ". . . that Plaintiff's damages were [not] limited to those which he could prove were proximately caused by the Defendant's negligence," (254 So.2d at p. 17; Appendix M hereto p. 31a.) and that the trial court did not err in applying the Florida law.

The decision of the District Court of Appeal of Florida, First District, sustained the validity of the Florida common law and the Florida Standard Jury Instruction in the trial of this case even though repugnant to the Federal Employers' Liability Act as construed by other Federal and state courts.

QUESTIONS PRESENTED

1. Was there evidence in the record of contributory negligence sufficient to preclude a directed verdict in Respondent's favor and to require submission of that issue to the jury for determination?

2. Does the Florida Standard Jury Instruction concerning aggravation of a preexisting condition, as promulgated by the Supreme Court of Florida for use in trials in Florida, correctly state the applicable law under the Federal Employers' Liability Act?

STATUTES INVOLVED

The following statutes are involved:

1. The Federal Employers' Liability Act (FELA), 45 U.S.C. § 51:

> *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees*

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in

part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

2. The Federal Employers' Liability Act, 45 U.S.C. § 53: *Contributory negligence; diminution of damages*

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE

Raymond L. McDaniel, the Respondent, brought this suit in the Circuit Court of Dade County, Florida, under the Federal Employers' Liability Act. The Complaint alleged two accidents, the first occurring on September 6, 1967, and the second occurring on July 31, 1968. With regard to the second accident, the Boiler Inspection Act and Safety Appliance Act were also alleged to be applicable. (A-1a-3a). At the Petitioner's request the case was transferred to the Circuit Court of Duval County, Florida. (A-4a).

The Complaint claimed damages for injuries allegedly sustained in Waycross, Georgia, while Respondent was employed by the Petitioner as a switchman, on two occasions. The first injury was alleged to have occurred on September 16, 1967 at night while the Respondent was riding upon a box car which collided against another railroad car, throwing him to the ground. Respondent charged the Petitioner with negligence as follows:

> "a) In furnishing the plaintiff a dangerous and unsafe place to work.
>
> b) In failing to provide the plaintiff with a reasonably safe place to work.
>
> c) In negligently operating and controlling the car upon which plaintiff was riding at the time of the subject accident.
>
> d) In negligently failing to give proper and adequate signals and warnings of switching operation.
>
> e) In operating the cut of cars upon which plaintiff was riding at an excessive rate of speed."

The second accident allegedly occurred on July 31, 1968,

also during the hours of darkness, when the Respondent attempted to board Engine No. 25 and the grab iron which the Respondent was utilizing for the purpose of boarding the engine gave way, causing him to fall to the ground. The Complaint charged the Petitioner with negligence as follows:

> "a) In furnishing the plaintiff a dangerous and unsafe place to work.
>
> b) In failing to provide the plaintiff with a reasonably safe place to work.
>
> c) In negligently maintaining its engine in that the grab iron on said engine was not fastened properly."

The Complaint charged the Petitioner with a violation of the Safety Appliance Act and Boiler Inspection Act in the second accident.

The Petitioner filed its Answer denying the negligence alleged in the Complaint, denying that it violated the Safety Appliance Act and Boiler Inspection Act, and alleging that, as to the Respondent's claim under the Federal Employers' Liability Act, the Respondent was guilty of negligence contributing in whole or in part to his injuries and to the extent that his negligence contributed or resulted in part in his injuries, Respondent's damages should be diminished in accordance with the degree of negligence attributable to him. (A-32, 33).

The trial of this cause commenced on June 29, 1970, before a jury and was concluded on July 1, 1970, when a verdict of Sixty-Seven Thousand Five Hundred ($67,500.00) Dollars was returned for the Respondent and against the Petitioner, Seaboard Coast Line Railroad Company. Judgment was thereafter entered on the verdict.

On July 13, 1970, Petitioner, Seaboard Coast Line Railroad Company, filed its Motion for Judgment in accordance with Motion for Directed Verdict or, in the alternative, Motion for New Trial or, in the alternative for a Remittitur. (A-18a-27a). This Motion was denied by the trial court by Order, filed July 20, 1970 (A-27a).

Petitioner appealed to the District Court of Appeal of Florida, First District, seeking reversal of the Final Judgment on both grounds here asserted. The District Court of Appeal heard oral argument on June 22, 1971, and thereafter by its opinion filed October 21, 1971 (Appendix M hereto, p. 28a; 254 So.2d 15), affirmed the Final Judgment, and denied Petitioner's Petition for Rehearing on November 18, 1971 (Appendix N hereto, p. 32a).

In an effort to exhaust all possible state court remedies, Petitioner filed a timely petition for a writ of certiorari with the Supreme Court of Florida seeking review of such judgment. The petition for certiorari was denied on March 24, 1972 (Appendix O hereto, p. 33a; 260 So.2d 517).

STATEMENT OF FACTS

On September 6, 1967, the Respondent, Raymond L. McDaniel, was employed by the Petitioner as a switchman in its yard at Waycross, Georgia, and had been employed by the Petitioner in that position for twenty-two years. At approximately 11:30 o'clock P.M. on that date, Respondent was assigned to a crew that was to uncouple three freight cars from the rear of Train No. 96 which had stopped at the Waycross Passenger Station. The switch engine, being operated by Respondent's crew, coupled up to the three freight cars. With Mr. McDaniel in position on the northeast corner of the second car, the engine moved southward, and the plan

was to uncouple the cars from this engine and allow them to roll into one of the tracks near the Waycross freight house. The engine was to increase speed and go into a track referred to as 97-Y. The conductor was riding the footboard of the engine passing signals to the engineman as to when the engine should speed up and when the cars were to be uncoupled and allowed to roll into one of the tracks. The cars entered Track No. 1 and struck other freight cars standing in Track No. 1, resulting in Mr. McDaniel's being thrown off the car, landing on his feet on the ground.

Following the accident on September 7, 1967, Dr. Samuel Victor examined the Respondent and described his injuries as "contusion left elbow and spine." Mr. McDaniel returned later that day and was x-rayed by Dr. Neal F. Yeomens, a radiologist. Dr. Yeomens found no evidence of fracture or dislocation. After x-rays were made, Respondent was allowed to return to duty, and he worked his regular assignment until October 23, 1967, when he was held out of service due to complaints with pain in his neck, headaches, and difficulty with his vision. Dr. Victor continued to see him with regard to his complaint concerning "distance and timing." Dr. Victor was of the opinion that the Respondent's problem was an emotional reaction rather than any true organic problem. He was sent to Dr. James G. Lyerly in Jacksonville for neurological consultation, and it was Dr. Lyerly's opinion that Respondent's problems were mostly a functional nervous disorder with some hysterical manifestations. He attributed the slight fuzziness of vision and blurred vision to a nervous tension basis. Mr. McDaniel returned to work November 6, 1967.

On July 31, 1968, Respondent was involved in another accident which occurred in approximately the same location, and interestingly enough, involved the same movement as

the first accident in which the crew was going to get the freight cars from the rear of Train No. 96. Mr. McDaniel was on the left side of Engine No. 25, which was the north side. He had aligned the switch for the unit to move from the freight house track to the passenger station track. The other switchman was on the right side of the unit and signaled the engineman to move forward. After aligning the switch, Mr. McDaniel took a few steps in a westward direction in order to get on the front step of Unit No. 25 as it passed. When he reached for the grab iron, he testified that the grab iron came loose and that he was thrown off balance, resulting in his falling from the step to the ground, landing on both feet. He testified that he continued to hold to the grab iron, resulting in injury to his neck and shoulders. The crew foreman was up at the station at the time the accident allegedly occurred, and he testified that Mr. McDaniel told him about the broken grab iron but that he did not tell him that he was injured. When the crew knocked off from work, Mr. McDaniel went home and took a shower and then called his union chairman, advising him of the accident, and it was the union chairman who took Mr. McDaniel to the hospital.

Following the second accident, Mr. McDaniel was again examined by Dr. Victor, who described his injuries as a "minimal contusion of the back of the neck and the lower back." He also found Mr. McDaniel to be "anxious and apprehensive." Dr. Yeomens x-rayed Mr. McDaniel on August 1, 1968, and he found no evidence of fracture or dislocation. Respondent was allowed to return to work on September 5, 1968, but he said that he was unable to work and stayed out of service. The Respondent saw Dr. Seymour Morse, an orthopedic surgeon in Jacksonville, having been referred to Dr. Morse by his attorney. Dr. Morse testified that he found no pertinent objective findings and that he was of the opinion that Mr. McDaniel had a severe problem

in motivation and that further treatment may be warranted in the field of psychotherapy for improvement of motivation.

Mr. McDaniel was returned to work in January, 1969. He had another accident in January, 1969, after working approximately two weeks. He was seen again by Dr. Victor but was not permitted to return to work without further examinations. Arrangements were made for Mr. McDaniel to be examined by Dr. Adney K. Sutphin, Chief Medical Officer of the Seaboard Coast Line Railroad Company, and that examination was made in Jacksonville on February 13, 1969. Dr. Sutphin made a complete examination. He stated that his impression was that Mr. McDaniel was consciously malingering or experiencing a severe conversion hysteria. His best professional opinion was that it was malingering. Arrangements were then made for Mr. McDaniel to have consultation with Dr. William H. McCullagh, a psychiatrist in Jacksonville, and Mr. McDaniel was examined by Dr. McCullagh on February 28, 1969. It was Dr. McCullagh's conclusion that Mr. McDaniel was suffering from a depressive reaction, an emotional depression, a condition which was activated by the Plaintiff's personal and marital problems. Dr. McCullagh's report indicated that Mr. McDaniel's disability was not the result of any injury on the railroad, and Mr. McDaniel was not approved to return to duty after March 7, 1969.

ARGUMENT AND REASONS FOR ALLOWANCE OF THE WRIT

Point 1

WAS THERE EVIDENCE IN THE RECORD OF CONTRIBUTORY NEGLIGENCE SUFFICIENT TO PRECLUDE A DIRECTED VERDICT IN RESPONDENT'S FAVOR AND TO REQUIRE SUBMISSION OF THAT ISSUE TO THE JURY FOR DETERMINATION?

Petitioner submits that the Federal courts and other state courts would answer the above question in the affirmative, contrary to the decision and judgment of the Florida court, and that the Writ should be granted.

This is a case arising under the Federal Employers' Liability Act (FELA), 45 U.S.C.A. §§ 51-60. There are two accidents involved in the case, the first occurring on September 6 ,1967, and the second occurring on July 31, 1968. With regard to the second accident, the Boiler Inspection Act and Safety Appliance Act, 45 U.S.C.A. §§ 1-51, were also applicable.

As to Respondent's claim under the Federal Employers' Liability Act, the Petitioner raised the defense of contributory negligence. At the close of all the evidence, the Court directed a verdict in Respondent's favor and against the Petitioner with regard to the defense of contributory negligence. Respondent's counsel made full advantage of that turn of events at the beginning of his closing argument, when he proclaimed to the jury:

> "Ladies and gentlemen, during your recess the Court has met with the lawyers in the case and has made certain rulings of law.
>
> ". . . [T]he railroad had a defense in the case that Mr. McDaniel's negligence himself, his failure to look

out for himself, caused or contributed to causing the accident and the injury.

"At this point in the case the Judge has ruled under the evidence presented before him and before you there is no evidence whatsoever as to Mr. McDaniel's failure to act properly under the circumstances, so the railroad's defense as to this accident involving the cut of cars has been stricken . . ."

The Court also refused to give to the jury Petitioner's Requested Instruction No. 5, concerning contributory negligence. (A-106)

Petitioner submits that the trial court erred in directing a verdict on the issue of contributory negligence and in refusing to give the requested instruction under the FELA. The decision of the District Court of Appeal of Florida, First District, in affirming the trial court is in direct conflict with and repugnant to decisions of the Federal courts and other state courts which set forth the minimal proof of negligence required to support a claim of contributory negligence under the FELA. As strange as it may seem, the issue raised is a relatively new question, as pointed out by Judge John R. Brown in *Page v. St. Louis Southwestern Railway Co.*, 349 F. 2d. 820 (U.S., 5th Cir., 1965), where he stated at page 823 as follows:

> "Attesting again to the marvels of an advocative system which, grinding out the thousands of FELA cases in State and Federal appellate courts, nevertheless after a half century's experience under the Act still leaves new questions, this problem is very, very fresh, the materials of decision are scarce, and the score now stands 1 to 1. . . ."

Under the Federal Employers' Liability Act, the contributory negligence of the Plaintiff diminishes the recovery in proportion to the amount of negligence attributable to the

employee. See 45 U.S.C.A. § 53. As will be pointed out subsequently, the law concerning the sufficiency of evidence required in the Plaintiff's case against the railroad is the same standard of causation which applies to the Plaintiff's own negligence.

What evidence is considered "sufficient" to support a recovery against the railroad under the FELA?

This Court dealt with the question in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 448, 1 L.Ed.2d 493, where the following is said with reference to the FELA:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities . . ."

Is the *Rogers* standard the same standard of causation which applies to the Plaintiff's own negligence?

In the case of *Page v. St. Louis Southwestern Railway Co.*, supra, Judge Brown dealt with this question. In that case, the plaintiff employee urged that the standard of causation

imposed upon the railroad "was in the *Rogers* theme of negligent acts playing any part, no matter how slight, in bringing about the injury," but that the standard was not the same as to contributory negligence. The Court stated at page 822 as follows:

> ". . . As between the injured worker and the Railroad, he [plaintiff] thinks that is a fine and fair charge. But not so, he says, when it comes to judging causation as to asserted contributory negligence of the Employee. Here he wants the good old-fashioned dialectic of proximate causation with all of its built-in metaphysical concepts of natural and unbroken sequence, but for, foreseeability of harm and the like."

The Court, however, held that from a substantive point of view, "we think that from the very nature of comparative negligence, the standard of causation should be single." (See page 824).

In two cases decided the same year as the *Page* case, supra, two other courts came to the same conclusion as the Fifth Circuit. In *Ganotis v. New York Central Railroad Co.*, 342 F. 2d. 767 (U.S., 6th Cir., 1965), the Sixth Circuit Court of Appeals stated at pages 768 and 769 as follows:

> ". . . We do not believe that the Act also intended to make a distinction between proximate cause when considered in connection with the carrier's negligence and proximate cause when considered in connection with the employee's contributory negligence. If it had so intended, express words to that effect could easily have been used . . ."

A similar finding was made by the District Court for the Eastern District of Pennsylvania in the case of *Mumma v.*

Reading Company, 247 F. Supp. 252 (U.S., E.D.Pa., 1965). In the *Mumma* case, the Court said at page 254 as follows:

> ". . . . [T]he sufficiency of the evidence to take the issue of contributory negligence to the jury is to be tested by the same standards that are used to test the sufficiency of plaintiff's evidence on the issues of negligence and proximate cause. . . . Tested by these standards, there was sufficient evidence, although it was extremely meager, to permit a finding of contributory negligence in the accident of January 4, 1964."

The Petitioner contends that the lower courts did not apply the *Rogers* standard to the Respondent's negligence, however meager in the courts' opinion the evidence of that negligence may have been. In fact, the District Court of Appeal, First District, never actually recognized that the *Rogers* standard applies to an employee's negligence. The court only stated as follows:

> "Appellant argues strenuously that the same standards of negligence and causal relationships applicable to support a claim of railroad liability under the Federal Employers' Liability Act apply in the consideration of the employee–plaintiff's contributory negligence. . . . In short, appellant argues that since the decisions construing the liability of the railroad in FELA cases require minimal proof of actionable negligence on the part of the employer, a like standard must be utilized in evaluating evidence of contributory negligence on the part of the injured employee. (254 So.2d at 16; Appendix M hereto, p. 28a).

Without holding that Petitioner's argument stated the applicable law under the FELA, the Florida appellate court

nevertheless proceeded to evaluate the evidence of contributory negligence under Florida common law, referring to "a legion of cases" in Florida (254 So.2d at p. 16; Appendix M hereto p. 30a), and found no negligence as a matter of law in Florida. If the trial court had applied the law in *Rogers* and *Page*, it would have allowed the jury to decide the question of contributory negligence based upon the requested instruction. It is for that purpose Petitioner is applying to this Court.

What was the evidence of negligence on the part of Plaintiff in this case?

The Respondent in his own testimony at the trial laid the groundwork for showing that it was up to the jury to determine whether Respondent was guilty of contributory negligence, no matter how small, that may have played any part in bringing about the injury complained of. The accident occurred at approximately 11:30 p.m. on September 6, 1967 during a switching move at Waycross, Georgia. In Respondent's own words, "we was supposed to come up behind this train, No. 94, 96 – they changed the name or the number along there somewhere, but we were supposed to come get behind it, get the cars of merchandise for the freight house at Waycross, get up behind it and spot it at the freight house." The accident occurred after the crew obtained three cars from the rear of train number 96 and as they were moving the cars to the freight house. There is evidence in the record upon which the jury could have found: (1) that Respondent negligently failed to use the brake at his disposal to stop or slow down the cut of cars as it was his job to do; (2) that Respondent negligently failed to realize sufficiently in time that he would have to use the brake to stop the cut of cars prior to the collision; (3) that Respondent negligently placed himself in a position where his visibility was unnecssarily limited in the direction the move was going.

The evidence is as follows:

(1) *That Respondent negligently failed to use the brake at his disposal to stop or slow down the cut of cars as it was his job to do.*

Respondent described his function on the move as follows:

> "MR. BECKHAM: What was your particular job as a member of that crew?
>
> "A: I was supposed to climb up on the end of the car and tie the handbrake and stop the cars when they got by the engine, far enough to clear, so we could come back and get around them with the engine and shove them down and spot them at the platform." (A-7a).

And further:

> "MR. GABEL: Mr. McDaniel, as far as this 1967 incident, as I understand it you intended to take the three cars from the rear of the 94 or 96, whatever it was at that time, the same train, and spot them at the freight house; it that correct?
>
> "A: That's correct." . . . (A-8a).
>
> "MR. GABEL: Now, I believe you said that each of the freight cars had a handbrake; is that true?
>
> "A: Yes.
>
> "MR. GABEL: And would it be safe to say that your function was to use the brake and slow the cars down and stop them by the freight house?
>
> "A: That was the job that I was supposed to do; yes, sir, after they cleared the switch that Alvin Gordon threw." . . . (A-8a).

"MR. GABEL: And I believe you said that your function on the cut of cars was to control the movement of the cars as far as braking or stopping the cars; is that true?

"A: That's right." (A-10a).

Respondent's apparent excuse for not using the handbrake, as it was his job to do, was that he did not realize he needed to until a few seconds before he hit the cars ahead. The jury certainly had evidence enough in the record to find that Respondent negligently failed to use the brake, but an alternative finding leads to the Petitioner's second point.

(2) *That Respondent negligently failed to realize sufficiently in time that he would have to use the brake to stop the cut of cars prior to the collision.*

The Respondent's attorney asked the Respondent several times on direct examination questions designed to elicit testimony to the effect that Respondent did not know which track the cut of cars would be placed on and that he found out which track he was on only seconds before the collision.

See the following excerpts:

"MR. BECKHAM: Did you know at the time that you were riding the cars which track that switchman was actually going to push them into?

"A: I did not; no, sir." . . .

"MR. BECKHAM: When did you find out what track the cars were going into?

"A: Just a few seconds before they hit." . . . (A-7a).

"MR. BECKHAM: How many tracks were there available to the switchman at that point, to put you in?

"A: There was three tracks, but I was supposed to have gone in track 3." . . .

"MR. BECKHAM: All right. Now, where were you when you first learned or realized which track you were going into?

"A: I must have been about, maybe a quarter length or a little further from those cars that I hit. I knew I was supposed to go in track 3.

"MR. BECKHAM: What track did you actually go into?

"A: I went in track 1." (A-7a-8a).

On cross-examination, evidence was presented from the Respondent upon which the jury could have found that Respondent knew that track number 3 was not clear and that track number 1 was the only place he could have been sent. The cross-examination consisted of the following questions and answers:

"MR. GABEL: And in this case you knew that track 3 and track 2 were not clear; did you not know that?

"A: I knew that after I hit.

"MR. GABEL: I refer to your deposition which was taken on May 5, 1970 at which time you were under oath and your attorney was there, page 46, and ask you if you gave this answer to this question:

'Question: Where were you heading and what were you going to do?

'Answer: We had to come down this track 1, which is the main line, and somewhere in this vicinity here, the foreman was supposed to have pulled a pin and let the engine go. In this special case, track 3 wasn't clear and track 2 wasn't clear, and earlier in the evening, I had put three piggy-back cars in track 1 and there was approximately one car length in the clear.

'So Mr. Gordon, he got off and was supposed to line the switch. Well, there's a B&WY switch right here too.'

"MR. GABEL: Did you not give that answer to that question? . . .

"A: Can I clear that up?

"MR. GABEL: I am just asking you if you gave that answer to that question.

"A: That is what I said; yes, sir.

"MR. GABEL: Well, let me ask the questions, and you tell me if you said it. If your lawyer wants to ask you some more, he can.

"But at that time you were under oath and you said that; is that correct?

"A: At that time, if that is on that paper, that is what I said." . . . (A-8a-9a).

"MR. GABEL: And you also knew that track number 1 was the only place the switchman could send you, because that's where you had the most room; is that true?

"A: Ask that question again, now.

"MR. GABEL: That track number 1, that you knew track number 1 was the only place that the switchman could send you –

"A: Did I say it was the only –

"MR: GABEL: – because that was where you had the most room?

"A: The cars in track 1 were approximately the same distance that the cars in track 2 were, but the cars in track 2 were not clear of track 3 where I was supposed to have gone.

"MR. GABEL: The question I asked you was did not you know that track number 1 was the only place the switchman could send you?

"A: No, sir.

"MR. GABEL: I refer to your deposition again on page 49.

"A: I didn't understand the question.

"MR. GABEL: I ask you if you gave this answer to this question:

> 'Question: Well, you said you had put some piggyback cars in track 1?
>
> 'Answer: In track 1. That was where you had the most room. That's the only place that he could send them where he could put them without tearing the side off the car on these cars that was in 2 here.

"MR. GABEL: Did you not give that answer to that question; just yes or no.

"A: It sounds like I did." . . . (A-9a-10a).

With the quoted portions above from cross-examination, it is clear that when the Respondent stated that he did not realize which track he was going into until shortly before impact, the jury could have found that he was being inattentive to the situation which he knew existed, since he had placed cars in track number 1 himself, and since the jury had evidence that he knew, or should have known, that the cars were going in track number 1, he did not realize his situation as he should and did not use the brake as he should.

The jury certainly could have found that the Respondent was in a position to realize his situation and also in a position to do something about his situation, and that the failure on his part to act was contributory negligence.

(3) *That Respondent negligently placed himself in a position where his visibility was unnecessarily limited in the direction the move was going.*

The Respondent testified that he was stationed between the second and third cars from the engine. He also said that there was a brake on the end of each car where he was. He testified that there was not a brake on the lead end of the cars, but by inference there should have been a brake at the trailing end of the leading car in the movement. Respondent was, however, a full car length behind that point. He stated in his testimony as follows:

"MR. GABEL: As you were coming into the track, you were two full car lengths from the lead end of the cars; in other words, you were on the back of the second boxcar?

"A: That's right.

"MR. GABEL: And, therefore, your visibility was limited in front; was it not?

"A: It was, in the direction we were going." (A-154-155).

Based upon this testimony, the jury could have found that the Respondent's visibility would have been better at another location if in fact he needed to see which direction the cut of cars was going so that he could use the handbrake which he was holding to stop or slow down the car prior to the collision which allegedly caused his damages.

In a case very similar factually to the case at bar, *Matthews v. Atchison, T. & S.F. Ry. Co.*, 129 P.2d 435 (Cal., 2d D.C.A., 1942), the court said at page 440 that the question of contributory negligence was for the jury. In the *Matthews* case the plaintiff was a switchman who was injured in much the same way as the plaintiff in the instant case. The plaintiff in *Matthews*, along with another switchman and an engine foreman, were switching a number of cars in a railroad yard at night. Plaintiff was directed by the engine foreman to ride a car destined for a track designated as No. 3, and to use the hand brake to stop it when it got "into the clear" on the track to which it was switched. "Into the clear" meant that the car was far enough from the entrance to the track so that it would not interfere with the movement of cars on adjacent tracks. Before the car got "into the clear" on Track 3 it ran against other cars which were on that track and stopped suddenly. Plaintiff had just started to set the brakes. He had his right hand on the brake and was holding one of the steps of the ladder on the car with his left hand. The sudden impact injured him. One favorable distinction in *Matthews* is that no one told the plaintiff there was not room on Track 3 to allow the car he was riding to go into the clear. In the

instant case the Respondent knew that the tracks involved had other cars in them.

Based upon the testimony cited above, it is Petitioner's contention that the jury could have found the Respondent's actions to be negligence, in Federal Employers' Liability Act terms, which may have played some small part in causing the injury complained of. If that is the case, then the law is clear that it was error to direct a verdict in Respondent's favor on the contributory negligence defense and to refuse Petitioner's instruction concerning contributory negligence.

Point 2

DOES THE FLORIDA STANDARD JURY INSTRUCTION CONCERNING AGGRAVATION OF A PREEXISTING CONDITION, AS PROMULGATED BY THE SUPREME COURT OF FLORIDA FOR USE IN TRIALS IN FLORIDA, CORRECTLY STATE THE APPLICABLE LAW UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT?

Petitioner submits that the Federal courts and other state courts have answered the above question in the negative and that the Writ should be granted.

The trial court gave the following instruction from the Florida Standard Jury Instruction, 6.2b:

> "Also, you should consider any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if

you cannot make that determination or if it cannot be said that the condition would have existed apart, you should consider and make allowance in your verdict for the entire condition." (15a).

In Petitioner's Requested Instruction No. 11, the last sentence is replaced by the following sentence:

"The Plaintiff is not entitled to recover for damages which would have resulted from his previous condition without the aggravation." (12a).

The evidence affirmatively showed that the Respondent was suffering from mental and emotional problems which were the cause of his condition and his continuing disability. The "aggravation" instruction which was read to the jury from the Florida law was improper for an FELA case.

The instruction read by the Court was adapted from *C. F. Hamblin, Inc. v. Owens,* 172 So.694 (Fla., 1937). In that case, a hardware store clerk fell from a ladder, setting in motion a dormant germ in plaintiff's leg that resulted in plaintiff's leg being amputated. The instruction given by the court in the instant case, based upon the *Owens* case, supra, is certainly the Florida law; however, it is not applicable in the instant Florida Employers' Liability Act situation.

The correct position was taken in *Matthews v. Atchison, T. & S. F. Ry.,* supra, where an injury to a railroad switchman's arm aggravated an abnormal condition of the elbow. The Court held damages must be limited to damage that resulted from aggravation. In a case very similar to the present case, *Shupe v. New York Central System,* 339 F.2d 998 (U.S., 7th Cir., 1965), the court specifically said that plaintiff cannot recover damages in an FELA suit which are not proximately caused by defendant's alleged negligence and that the plaintiff has the burden of proving what portion, if any, of the alleged loss of future earnings was caused by

the injury where there is a pre-existing condition to be aggravated.

Petitioner submits that in the present case, where Respondent did not prove that Petitioner caused the continuing disability, but apparently relied upon the theory that the Petitioner only aggravated his pre-existing condition, the rule cited above should apply, and the court erred in instructing the jury based upon the Florida law and not upon the law of the Federal courts and other state courts in FELA cases.

CONCLUSION

The action of the District Court of Appeal of Florida, First District, in failing to follow the controlling decisions of the Federal courts and other state courts in the interpretation of a Federal statute and in creating confusion and conflict in the decision law under that statute, provides this Court with jurisdiction to review the decision below. For the reasons set forth above the petition for a writ of certiorari should be granted and on further hearings on the merits the decision of the District Court of Appeal of Florida, First District, in this case should be reversed and the case remanded for new trial.

Respectfully submitted,

GEORGE D. GABEL, JR.
KURZ, TOOLE, TAYLOR, MOSELEY & GABEL
Suite 1014, Barnett Bank Building
Jacksonville, Florida 32202

Counsel for Petitioner

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the District Court of Appeal, First District, State of Florida, has been furnished to Beckham & McAliley, 1010 Concord Building, Miami, Florida 33130, and Horton & Schwartz, 410 Concord Building, Miami, Florida 33130, Attorneys for Respondent, by United States Mail this 20th day of June, 1972.

GEORGE D. GABEL, JR.

FILED
JUN 21 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No.

SEABOARD COAST LINE RAILROAD COMPANY,
a foreign corporation, *Petitioner,*

vs.

RAYMOND L. MCDANIEL, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT STATE OF FLORIDA

GEORGE D. GABEL, JR.
Kurz, Toole, Taylor, Moseley
& Gabel
Suite 1014 Barnett Bank Building
Jacksonville, Florida 32202

Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

No.

SEABOARD COAST LINE RAILROAD COMPANY,
a foreign corporation, *Petitioner*,

vs.

RAYMOND L. McDANIEL, *Respondent*.

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APPENDIX A

The Complaint, filed June 23, 1969 in the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida, is as follows:

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

No. 69-10412

RAYMOND L. MCDANIEL, *Plaintiff,*

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

COMPLAINT

Comes now the Plaintiff, RAYMOND L. MCDANIEL, by and through his undersigned attorneys, and sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, and alleges:

COUNT I

1. This is a civil action arising under §§ 51-60 Title 45 U.S.C.

2. At all times material hereto the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, is a Virginia corporation maintaining its principal place of business in the State of Florida. Said Defendant owns and operates a common carrier railroad system engaged in interstate commerce and said Defendant does business in Dade County, Florida.

3. At all times material hereto, the Plaintiff, RAYMOND L. MCDANIEL, was an employee of the Defendant railroad or its predecessor corporation, Atlantic Coast Line Railroad Company, and said Plaintiff was working at his regular employment in the furtherance of interstate commerce.

4. On or about September 16, 1967 at approximately 11:15 p.m., the Plaintiff, RAYMOND L. MCDANIEL, was employed by the Defendant as a switchman and was working in and about the Defendant's railroad yard in Waycross, Georgia, switching railroad cars. At said time and place, the Plaintiff was riding upon a boxcar in the performance of his duties when, as a result of Defendant's negligence, the boxcar upon which he was riding was shoved against another railroad car with such violence as to knock the plaintiff to the ground causing serious personal injury as hereinafter alleged.

5. At the aforesaid time and place the Defendant railroad was negligent in the following acts of omission or commission:

a) In furnishing the Plaintiff a dangerous and unsafe place to work.

b) In failing to provide the Plaintiff with a reasonably safe place to work.

c) In negligently operating and controlling the car upon which Plaintiff was riding at the time of the subject accident.

d) In negligently failing to give proper and adequate signals and warnings of switching operations.

e) In operating the cut of cars upon which Plaintiff was riding at an excessive rate of speed.

6. As a result of the negligence of the Defendant railroad

aforesaid, Plaintiff was severely injured and said injuries include but are not limited to injuries to the neck, back and hip. Said injuries are continuing and permanent in nature.

7. As a result of the aforesaid negligence of the Defendant railroad, the Plaintiff has in the past and will in the future suffer great mental and physical pain and suffering, shame and humiliation and personal inconvenience; he has been obliged to undergo medical treatment and will be required to continue such care in the future; his earning capacity has been diminished and he has sustained a loss of earnings and that he has been rendered less able to lead a normal life.

(COUNT II OMITTED)

WHEREFORE, the Plaintiff, RAYMOND L. MCDANIEL, sues the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a Virginia corporation and seeks judgment within the jurisdictional limits of this Court, to-wit: in excess of Five Thousand Dollars ($5,000.00) exclusive of costs and further demands trial by jury of all issues triable as of right by a jury.

(Counsel's signature omitted)

APPENDIX B

The Order, filed January 27, 1970, of the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida, transferring cause to the Circuit Court of the Fourth Judicial Circuit, In and For Duval County, Florida, is as follows:

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

No. 69-10412

RAYMOND L. MCDANIEL, *Plaintiff*,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

ORDER TRANSFERRING CAUSE

THIS CAUSE came on for hearing upon the Plaintiff's Motion for Rehearing. The Court having heard the argument of counsel, reviewed the appropriate authorities and being otherwise fully advised, it is

ORDERED AND ADJUDGED, that Plaintiff's Motion for Rehearing be and hereby is granted and this Court's Order of September 29, 1969, dismissing this cause, be and hereby is set aside and rendered naught. It is further

ORDERED AND ADJUDGED, *sua sponte*, that this cause be and hereby is transferred to the Circuit Court of the Fourth Judicial Circuit of Florida in and for Duval County and the Clerk of this Court is instructed to perform all duties necessary to

transfer this cause and the file herein to the Clerk of said Fourth Judicial Circuit of Florida.

DONE AND ORDERED this 12th day of January, 1970 in Chambers at the Dade County Courthouse, Miami, Florida.

/s/ James Lawrence King
CIRCUIT JUDGE

* * *

APPENDIX C

The Amended Answer, filed February 25, 1970, is as follows:

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 70-737 Division "D"

RAYMOND L. MCDANIEL, *Plaintiff*,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

AMENDED ANSWER

The Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, by and through its undersigned attorneys, for its Amended Answer to the Complaint filed by the Plaintiff herein, says:

FIRST DEFENSE

The Defendant admits that it owns and operates a com-

mon carrier railroad system engaged in interstate commerce, but it specifically denies each and every allegation contained in said complaint not herein specifically admitted.

SECOND DEFENSE

The Defendant denies the alleged negligence and consequences thereof.

THIRD DEFENSE

The Defendant denies that it violated the Safety Appliance Act and specifically denies all allegations of violations of said act.

FOURTH DEFENSE

As to the Plaintiffs claim under the Federal Employers' Liability Act, the Defendant alleges that at the time and place of the alleged accident which is the subject matter of the complaint, the Plaintiff was guilty of negligence contributing in whole or in part to his injuries and to the extent that his negligence contributed or resulted wholly in his injuries, Plaintiff is barred of recovery, and to the extent that his negligence resulted in part in his injuries, Plaintiff's damages are diminished in accordance with the degree of negligence attributable to him. In making such affirmative averments and allegations this Defendant does not thereby admit any negligence whatsoever on its part or that Plaintiff was in any way injured as claimed.

(Counsel's signature omitted)

APPENDIX D

Excerpts of trial testimony of Raymond L. McDaniel, Plaintiff, are as follows:

EXCERPTS OF TRIAL TESTIMONY OF RAYMOND L. McDANIEL, PLAINTIFF

MR. BECKHAM

"Q What was your particular job as a member of that crew?

A I was supposed to climb up on the end of the car and tie the handbrake and stop the cars when they got by the engine, far enough to clear, so we could come back and get around them with the engine and shove them down and spot them at the platform."

"Q Did you know at the time that you were riding the cars which track that switchman was actually going to push them into?

A I did not; no, sir." . . .

"Q When did you find out what track the cars were going into?

A Just a few seconds before they hit." . . .

"Q How many tracks were there available to the switchman at that point, to put you in?

A There was three tracks, but I was supposed to have gone in track 3." . . .

"Q All right. Now, where were you when you first learned or realized which track you were going into?

A I must have been about, maybe a quarter length or a little further from those cars that I hit. I knew I was supposed to go in track 3.

Q What track did you actually go into?

A I went in track 1."

MR. GABEL

"Q Mr. McDaniel, as far as this 1967 incident, as I understand it you intended to take the three cars from the rear of the 94 or 96, whatever it was at that time, the same train, and spot them at the freight house, is that correct?

A That's correct." . . .

"Q Now, I believe you said that each of the freight cars had a handbrake; is that true?

A Yes.

Q And would it be safe to say that your function was to use the brake and slow the cars down and stop them by the freight house?

A That was the job that I was supposed to do; yes, sir, after they cleared the switch that Alvin Gordon threw." . . .

"Q And in this case you knew that track 3 and track 2 were not clear; did you not know that?

A I knew that after I hit.

Q I refer to your deposition which was taken on May 5, 1970 at which time you were under oath and your attorney was there, page 46, and ask you if you gave this answer to this question:

'Question: Where were you heading and what were you going to do?

'Answer: We had to come down this track 1, which is the main line, and somewhere in this vicinity here, the foreman was supposed to have pulled a pin and let the engine go. In this special case, track 3 wasn't clear and track 2 wasn't clear, and earlier in the evening, I had put three piggy-back cars in track 1 and there was approximately one car length in the clear.

'So, Mr. Gordon, he got off and was supposed to line the switch. Well, there's a B&WY switch right here too.'

Q Did you not give that answer to that question?

A Can I clear that up?

Q I am just asking you if you gave that answer to that question.

A That is what I said; yes, sir.

Q Well, let me ask the questions, and you tell me if you said it. If your lawyer wants to ask you some more, he can.

But at that time you were under oath and you said that; is that correct?

A At that time, if that is on that paper, that is what I said." . . .

"Q And you also knew that track number 1 was the only place the switchman could send you, because that's where you had the most room; is that true?

A Ask that question again, now.

Q That track number 1, that you knew track number 1

was the only place that the switchman could send you –

A Did I say it was the only –

Q – because that was where you had the most room?

A The cars in track 1 were approximately the same distance that the cars in track 2 were, but the cars in track 2 were not clear of track 3 where I was supposed to have gone.

Q The question I asked you was did not you know that track number 1 was the only place the switchman could send you?

A No, sir.

Q I refer to your deposition again on page 49.

A I didn't understand the question.

Q I ask you if you gave this answer to this question:

'Question: Well, you said you had put some piggyback cars in track 1?

'Answer: In track 1. That was where you had the most room. That's the only place that he could send them where he could put them without tearing the side off the car on these cars that was in 2 here."

Q Did you not give that answer to that question; just yes or no.

A It sounds like I did." . . .

"Q And I believe you said that your function on the cut of cars was to control the movement of the cars as far as braking or stopping the cars; is that true?

A That's right."

"Q As you were coming into the track, you were two full car lengths from the lead end of the cars; in other words, you were on the back of the second boxcar?

A That's right.

Q And, therefore, your visibility was limited in front; was it not?

A It was, in the direction we were going."

* * *

APPENDIX E

The Defendant's Requested Instruction No. 5, is as follows:

DEFENDANT'S REQUESTED INSTRUCTION NO. 5

"No. 5. Contributory negligence is the failure on the part of a person who has been injured to exercise reasonable and ordinary care for his own safety under the circumstances, which failure to exercise such due care contributed to the accident or injury sustained. If the Plaintiff's contributory negligence played any part, no matter how small, in actually bringing about or causing the injury complained of, such contributory negligence of the employee 'shall not bar a recovery, but the damages shall be diminished . . . in proportion to the amount of negligence attributable to such employee.'"

APPENDIX F

The Defendant's Requested Instruction No. 11, is as follows:

DEFENDANT'S REQUESTED INSTRUCTION NO. 11

"No. 11. You should consider any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. The Plaintiff is not entitled to recover for damages which would have resulted from his previous condition without the aggravation."

* * *

APPENDIX G

Excerpts from Colloquy Between the Court and Counsel at Charge Conference, is as follows:

EXCERPTS FROM COLLOQUY BETWEEN THE COURT AND COUNSEL AT CHARGE CONFERENCE

"MR. BECKHAM: Before we get into the charges, the Plaintiff, at the conclusion of all the evidence moves the Court for a directed verdict on the issue of liability under both counts one and two, and further moves the Court for a directed verdict on the issue of contributory negligence. . .

THE COURT: Now, off the record just a moment.

(Discussion off the record)

THE COURT: Now, the motion will be denied.

MR. BECKHAM: Is Your Honor of the opinion that there is any basis for the submission of the issue of contributory negligence? Number one, there is no contributory negligence defense on the grabiron.

MR. GABEL: Right.

MR. BECKHAM: So I move also on the issue of contributory negligence with reference to the other count where he was riding the brake step.

THE COURT: All right. Off the record, now.

(Discussion off the record)

THE COURT: I will strike the defense of contributory negligence as to the first accident.

MR. BECKHAM: Right. That is the only one they alleged it to.

THE COURT: There is no evidence of contributory negligence at all as far as the Court can see.

Now, off the record.

(Discussion off the record)

. . . MR. BECKHAM: And I do again request the Court to give the aggravation of the previously existing dormant condition charge from the standard charges.

THE COURT: All right. . .

THE COURT: Aggravation of a previously existing – I've got it. We've got the standard charge.

. . . MR. GABEL: Your Honor, my number 11, I ask for a modification of that.

THE COURT: Your number 11? . . .

MR. GABEL: He's got an aggravation –

THE COURT: I will have the aggravation.

MR. BECKHAM: 6.2, I believe it is. It doesn't show there, but I think – look at 6.2. . . .

THE COURT: Yes, aggravation, I'll give that, and you're doing what, now?

MR. GABEL: I found an FELA case that has it about the same, but that last sentence I thought I would request be added.

THE COURT: 'Plaintiff is not entitled to recover damages which would have resulted from his previous condition –' (reading.)

MR. BECKHAM: This tells them that they should apportion it if they can.

THE COURT: I'm going to give this (indicating). Let's go through yours now . . .

MR. BECKHAM: Five is out?

THE COURT: Five is out. . .

MR. BECKHAM: You have already denied number 11 in favor of the standard charge.

THE COURT: Yes. I said I'd give the general. . .

MR. GABEL: I'd just like to object.

THE COURT: You object to that?

MR. GABEL: Yes.

MR. BECKHAM: To what, reading the statute?

MR. GABEL: On the amendment, the amendment part there, and number – his requested instructions number two and five.

THE COURT: All right.

MR. GABEL: And the denial of all my instructions.

THE COURT: All noted in the record."

* * *

APPENDIX H

The Florida Standard Jury Instruction 6.2b as Requested by Plaintiff and Given to the Jury, is as follows:

FLORIDA STANDARD JURY INSTRUCTION 6.2b AS REQUESTED BY PLAINTIFF AND GIVEN TO THE JURY

"Also, you should consider any aggravation of an existing disease or physical defect or activation of any such latent condition resulting from such injury. If you find there was such an aggravation, you should determine if you can what portion of the Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination, or if it cannot be said that the condition would have existed part from the injury, you should consider and make allowance in your verdict for the entire condition."

APPENDIX I

The Verdict of Jury, filed July 1, 1970, is as follows:

VERDICT

We, the Jury, find for the Plaintiff, RAYMOND L. MCDANIEL, and assess his damages at $67,500.00.

SO SAY WE ALL.

(Foreman's signature omitted)

* * *

APPENDIX J

The Verdict and Final Judgment, filed July 1, 1970, in the Circuit Court of the Fourth Judicial Circuit, In and For Duval County, Florida, is as follows:

VERDICT AND FINAL JUDGMENT

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 70-737 Division "D"

RAYMOND L. MCDANIEL, *Plaintiff*,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

This action was tried and the Jury rendered the following Verdict:

VERDICT FOR PLAINTIFF

We, the Jury, find for the plaintiff, RAYMOND L. MCDANIEL, and assess his damages in the amount of $67,500.00.

So say we all.

Dated: July 1, 1970.

Jacksonville, Florida.

(Foreman's signature omitted)

Pursuant to the Verdict rendered in this action

IT IS ADJUDGED that Plaintiff, RAYMOND L. MCDANIEL, recover from Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, the sum of $67,500.00, with his cost, in the sum of $386.50, for which let execution issue.

/s/ Marion W. Gooding
Circuit Judge

APPENDIX K

The Motion for Judgment in Accordance with Motion for Directed Verdict or, in the Alternative, Motion for New Trial or, in the Alternative, for a Remittitur, filed July 13, 1970, is as follows:

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 70-737 Division "D"

RAYMOND L. MCDANIEL, *Plaintiff*,

v.

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Defendant.

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR A REMITTITUR

Pursuant to the Florida Rules of Civil Procedure, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, by and through its assigned attorneys, moves the Court to set aside the verdict entered in the above-entitled action on July 1, 1970, and the judgment entered thereon, and to enter judgment in favor of the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, in accordance with the Motion for Directed Verdict made at the close of Plaintiff's case and renewed by Defendant at the close of all the testimony herein on the following grounds:

(a) There was no evidence of negligence on the part of

the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation.

(b) There was no evidence that the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, was guilty of negligence which was a proximate cause of the Plaintiff's injury and damage.

(c) There was no evidence of a violation of the Boiler Inspection Act which was a proximate cause of the Plaintiff's injury and damage.

(d) The evidence affirmatively showed that the sole proximate cause of Plaintiff's condition and damage was the Plaintiff's mental and emotional state and the Plaintiff's failure to seek medical attention for said condition following the alleged incident of September 6, 1967.

(e) There was no evidence adduced that was legally sufficient to establish that said Plaintiff was within the coverage of the Boiler Inspection Act and Safety Appliance Act.

WHERFFORE, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, respectfully submits that judgment should be entered in its favor notwithstanding the aforementioned verdict.

In the alternative, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, moves the verdict of the jury in the above-entitled cause be set aside and that the judgment entered on said verdict be vacated and set aside and that a new trial be granted to the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, for the following reasons:

1. The verdict is contrary to law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and evidence.

4. The verdict is contrary to the manifest weight of the evidence.

5. There is no evidence that the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, was guilty of negligence.

6. There was no evidence that the Defendant, SEABOARD COAST LINE RAILROAD, a foreign corporation, was guilty of a violation of the Boiler Inspection Act or Safety Appliance Act.

7. The evidence affirmatively shows that the sole proximate cause of the Plaintiff's condition and damage was the Plaintiff's own negligence in failing to seek medical attention for his mental and emotional problems following the alleged incident of September 6, 1967.

8. The Court erred in denying Defendant's Motion to direct a verdict in its favor at the close of Plaintiff's case.

9. The Court erred in denying Defendant's Motion to direct a verdict in its favor at the close of all the evidence.

10. There is no sufficient or substantial evidence pending to support the amount of the jury's verdict.

11. The verdict is excessive and entirely speculative and appears to have been given under the influence of passion, prejudice, bias and sympathy.

12. It affirmatively appears from the verdict that the jury disregarded their oaths as jurors and arbitrarily and capriciously refused to render a verdict on the testimony

and law given by the Court and rendered a verdict based solely on sympathy, passion and prejudice.

13. The Court erred in failing to grant Defendant's Motion for Directed Verdict at the close of Plaintiff's evidence and at the conclusion of all of the evidence where all of the evidence affirmatively showed that Plaintiff was suffering from mental and emotional problems which were the cause of his condition and that said condition was caused by said problems and not related to Plaintiff's employment.

14. The evidence requires a finding that if Plaintiff's alleged injury and damage of September 6, 1967 was due to negligence, he was injured solely by reason of his own negligence.

15. The Court erred in directing a verdict in Plaintiff's favor at the close of all of the evidence as to Defendant's Fourth Defense as follows:

> "As to the Plaintiff's claim under the Federal Employers' Liability Act, the Defendant alleges that at the time and place of the alleged accident which is the subject matter of the complaint, the Plaintiff was guilty of negligence contributing in whole or in part to his injuries and to the extent that his negligence contributed or resulted wholly in his injuries, Plaintiff is barred of recovery, and to the extent that his negligence resulted in part in his injuries, Plaintiff's damages are diminished in accordance with the degree of negligence attributable to him."

16. The Court erred in giving to the jury Plaintiff's Requested Instruction No. 2 as follows:

> "No. 2. It is the duty of the railroad to use ordinary

care and prudence in furnishing to its employee a reasonably safe place in which to work and to use all reasonable precautions to maintain and keep such place in a reasonably safe condition, commensurate with the amount of danger which the railroad knew, or, in the exercise of due care, should have known, existed in the places where its employees must work. This duty is both continuing and non-delegable."

17. The Court erred in giving the jury Plaintiff's Requested Instruction No. 5 as follows:

"No. 5. Negligence is legal cause of injury if it directly and in natural and continuous sequence produces or contributes substantially in whole or in part to producing such injury, so that it can reasonably be said that, but for the negligence, the injury would not have occurred."

18. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 3 as follows:

"No. 3. In determining whether or not the Defendant was negligent in any way of the respects alleged in the Complaint, you should consider the conduct of the Defendant in the light of the circumstances at the time and place of Mr. McDaniel's accident, and not in the light of experiences gained in and because the accident, or in the light of a course of conduct which the accident and subsequent reflections on it may cause you to feel would have avoided injury to the Plaintiff had it been pursued by the Defendant. For, to use a popular but accurate expression, an issue of negligence is to be determined by foresight used at the time of the events inquired about; not by hindsight brought into play later."

19. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 4 as follows:

> "No. 4. The mere happening of an accident or injury to an employee while he is engaged in operations for the railroad will not warrant a recovery. The railroad is not required to furnish the best, the safest, or the newest applicances or methods of operation. It is not required to adopt extraordinary or unusual safeguards against risks and dangers. The limit of the duty of the railroad to its employees under the Federal Employers' Liability Act is to exercise ordinary care to supply a reasonably safe place to work. And in this case no breach of duty, if any, on the part of the Defendant could be considered by you unless you find by a legal preponderance of the evidence that the Defendant was negligent, that is, failed to exercise ordinary care, in one or more of the particulars charged in Plaintiff's Complaint and that such negligence, if any, proximately caused in whole or in part Plaintiff's injury, if any."

20. The Court erred in refusing to give the jury the Defendant's Requested Instruction No. 5 as follows:

> "No. 5. Contributory negligence is the failure on the part of a person who has been injured to exercise reasonable and ordinary care for his own safety under the circumstances, which failure to exercise such due care contributed to the accident or injury sustained. If the Plaintiff's contributory negligence played any part, no matter how small, in actually bringing about or causing the injury complained of, such contributory negligence of the employee shall not bar a recovery, but the damage shall be diminished . . . in

proportion to the amount of negligence attributable to such employee."

21. The Court erred in refusing to give to the jury the Defendant's Requesed Instruction No. 6 as follows:

"No. 6. I charge you, Gentlemen of the Jury, that it is not actionable negligence that an employer railroad fails to anticipate lack of care on the part of an employee."

22. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 7 as follows:

"No. 7. Ordinary prudence requires every person to use his faculties of hearing and sight (and common sense) for his own protection and to avoid places of danger. And he is conclusively presumed to know which he would have known, had he made ordinary use of his senses. Thus, if one voluntarily places himself in or remains in a position which he knows, or by the exercise of ordinary care should know, is dangerous, then his conduct may be found by you to be negligence and if such negligence, if any, is the sole proximate cause of the accident and resulting injuries, then he cannot recover."

23. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 8 as follows:

"No. 8. I charge you, Gentlemen of the Jury, that if you should find from the evidence that the Plaintiff's injury and damage, if any, was occasioned by a pure accident unmixed with any negligence on the part of the Defendant, if any, then and in such event the Plaintiff would not be entitled to recover in this

cause, and it would be your duty to return a verdict for the Defendant."

24. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 10 as follows:

"No. 10. 5.1 *Legal Cause.* Negligence is a legal cause of injury or damage if it directly and in natural and continuous sequence produces or contributes or contributes substantially to producing such injury or damage, so that it can reasonably be said that, but for the negligence, the injury or damage would not have occurred. Such injury or damage must be reasonably foreseeable in the light of attending circumstances."

25. The Court erred in refusing to give to the jury the Defendant's Requested Instruction No. 11 as follows:

"No. 11. 6.2 *Aggravation or activation of disease or defect:* Any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of Plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. The Plaintiff is not entitled to recover for damages which would have resulted from his previous condition without the aggravation."

26. The Court erred in refusing to sustain Defendant's objection during closing argument by Plaintiff's counsel to the jury in which reference was made to the work life expectancy of Plaintiff when no evidence as to such expectancy had been presented to the jury.

WHEREFORE, the Defendant, SEABOARD COAST LINE RAIL-

ROAD COMPANY, a foreign corporation, respectfully submits that in the event judgment is not entered by the Court in its favor notwithstanding the verdict, that a new trial should be granted to this Defendant.

Further in the alternative, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, moves that a Remittitur be ordered for the following reasons:

(i) The verdict is excessive and appears to have been given under the influence of passion, prejudice, bias and sympathy.

(ii) It affirmatively appears from the verdict that the jury disregarded their oath as jurors and arbitrarily and capriciously refused to render a verdict on the testimony and law given by the Court and rendered a verdict based solely on sympathy, passion and prejudice.

(iii) The evidence affirmatively showed that the Plaintiff was suffering from mental and emotional problems which were the cause of his condition and that said condition was caused by said problems and not related to Plaintiff's employment.

(iv) The evidence affirmatively showed that the cause of Plaintiff's condition and damage was Plaintiff's own negligence, in whole or in part, in failing to seek medical attention for his mental and emotional problems following the alleged incident of September 6, 1967.

(v) The Court, in directing a verdict in Plaintiff's favor at the close of all of the evidence as to Defendant's defense of contributory negligence, precluded the jury from considering in its verdict the contributory negligence of the Plaintiff and Plaintiff's damages should have been diminished in accordance with the degree of negligence attributable to him.

WHEREFORE, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation, respectfully submits that a Remittitur should be ordered in the event judgment is not entered by the Court in its favor notwithstanding the verdict or in the event a new trial is not granted to this Defendant.

(Counsel's signature and acknowledgement omitted)

* * *

APPENDIX L

The Order, filed July 20, 1970, denying Defendant's Motions, is as follows:

ORDER

This cause came on to be heard on Defendant's motion for judgment in accordance with motion for directed verdict or, in the alternative, motion for new trial or, in the alternative, for a remittitur, and the Court having heard argument of counsel and being advised in the premises, it is thereupon

ADJUDGED that said motion for judgment in accordance with motion for directed verdict or, in the alternative, motion for new trial or, in the alternative, for a remittitur be, and the same is, hereby denied.

DONE AND ORDERED at Jacksonville, Florida, this 20th day of July, 1970.

/s/ Marion W. Gooding
CIRCUIT JUDGE

APPENDIX M

The Opinion and Judgment of the District Court of Appeal, First District, State of Florida, filed October 21, 1971, and reported at 254 So.2d 15, affirming Final Judgment set forth in Appendix J, is as follows:

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA, JULY TERM, A.D. 1971

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION AND
DISPOSITION THEREOF IF FILED.

CASE NO. 0-48

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Appellant,

v.

RAYMOND L. MCDANIEL, *Appellee.*

An Appeal from the Circuit Court for Duval County.

Marion W. Gooding, Judge.

Kurz, Toole, Taylor, Moseley & Gabel, for Appellant.

Horton & Schwartz and Beckham & McAliley, for Appellee.

RAWLS, J.

Appellant Railroad appeals from an adverse judgment in favor of appellee McDaniel, and contends that the trial court erred in: 1. Directing a verdict as to the question of plain-

tiff's contributory negligence; and 2. Refusing to give defendant's requested instruction as to aggravation and giving Florida Standard Jury Instruction 6.2.b.

Two accidents are involved in this case. Plaintiff McDaniel filed suit pursuant to the provisions of the Federal Employers' Liability Act (FELA), 45 U.S.C.A. §§ 51-60, and the Boiler Inspection Act and Safety Appliance Act, 45 U.S.C.A. §§ 1-51. The Railroad denied the negligence alleged in the complaint and affirmatively alleged that plaintiff was guilty of contributory negligence as to his claim under the Federal Employers' Liability Act. At the close of all the evidence the trial court directed a verdict in plaintiff's favor as to the defense of contributory negligence.

On September 6, 1967, McDaniel, a veteran switchman, was assigned to a crew to uncouple three freight cars. A so-called "flying switch" was involved in the movement of the freight cars.(1) Two attempts to uncouple the cars to be switched failed. On the third attempt, the engine was able to "run away" from the cars uncoupled which were accidentally cut onto the wrong siding, resulting in the "cut cars" colliding with other cars on the sidetrack. As a consequence of the collision, McDaniel fell from the top of the car he was riding and was injured.

The second accident occurred on July 31, 1968. On that occasion the grab iron, attached to the locomotive which plaintiff was attempting to board, broke loose resulting in further injuries to plaintiff.

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(1) A flying switch was described by McDaniel as follows:
"... you have the cars behind you and you want them on the other side of you, so you pull them at a speed fast enough that you estimate they will go where you want them to go, you get up to that speed, you uncouple them, run off with the engine and get away from them, and you get on the other side of the switch and the man handling the switch lines the switch and diverts the cars to where you want them to go."

Appellant argues strenuously that the same standards of negligence and causal relationships applicable to support a claim of railroad liability under the Federal Employers' Liability Act apply in the consideration of the employee-plaintiff's contributory negligence. In support of this argument, in its brief appellant propounds the question: "What evidence is considered 'sufficient' to support a recovery against the railroad under the FELA?", and proceeds to the conclusion that only a "slight" showing of contributory negligence must be adduced in order to make the same a jury issue. In short, appellant argues that since the decisions construing the liability of the railroad in FELA cases require minimal proof of actionable negligence on the part of the employer, a like standard must be utilized in evaluating evidence of contributory negligence on the part of the injured employee.

In a legion of cases this jurisdiction has held that the question of contributory negligence is normally one that should be resolved by a jury under the proper instructions. However, there must be some proof by the defendant of negligence on the part of the plaintiff to support a charge of contributory negligence. Evidence of contributory negligence is somewhat analogous to the euphuism "a little bit pregnant." Either there is evidence of some negligence on the part of the injured party which contributed to the accident, or such is not adduced. A review of this record fails to disclose any evidentiary basis for such a charge, thus the trial judge was eminently correct in refusing to give same.

Appellant next contends that the trial court misled the jury on the question of damages by giving Standard Jury Instruction 6.2.b. which deals with the subject of aggravation of pre-existing injury. In its brief, appellant acknowledges that the jury instruction, which was adopted from the

case of C. F. Hamblen, Inc. v. Owens, 172 So. 694 (Fla. 1937), is the Florida law; however, it contends that pursuant to the holding in Florida East Coast Railway Company v. Pollack, 154 So. 2d 346 (Fla. DCA 3d, 1963), "No state statute, law or other enactment can enlarge or contract the operation of the act and the rights and obligations arising thereunder." Appellant, citing Shupe v. New York Central System, 339 F 2d 998 (7th Cir. 1965), concludes that plaintiff's damages were limited to those which he could prove were proximately caused by defendant's negligence. We do not agree. We hold that the instruction fairly states the applicable law not only of this jurisdiction but the construction of the FELA by federal authorities. Butler v. New York Central R. Co., 253 F. 2d 281 (7th Cir. 1958); and Florida East Coast Railway Co. v. McKinney, 227 So. 2d 99 (Fla. DCA 1st, 1969).

The judgment appealed is affirmed.

CARROLL, DONALD, Acting Chief Judge, and MASON, ERNEST E., Associate Judge, CONCUR.

APPENDIX N

The Order of the District Court of Appeal, First District, filed November 18, 1971, denying Petition for Rehearing, is as follows:

IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT,
STATE OF FLORIDA, JULY TERM, A.D. 1971

CASE No. 0-48

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Appellant,

v.

RAYMOND L. McDANIEL, *Appellee.*

ORDER

Petition for rehearing, filed November 2, 1971, having been considered,

IT IS ORDERED that the petition is hereby denied.

WITNESS the Honorable Donald K. Carroll, Acting Chief Judge, and Seal of the Court this 18th day of November, A.D., 1971.

/s/ Raymond E. Rhodes
Clerk

A True Copy

ATTEST:

/s/ Raymond E. Rhodes
Cler, First District Court of Appeal
Tallahassee, Florida

APPENDIX O

The Order of the Supreme Court of Florida, dated March 24, 1972, and reported at 260 So.2d 517, denying the Petition for Writ of Certiorari to review the Judgment set forth in Appendix M, is as follows:

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A.D. 1972
FRIDAY, MARCH 24, 1972

CASE NO. 41,871

DISTRICT COURT OF APPEAL, FIRST DISTRICT

SEABOARD COAST LINE RAILROAD COMPANY, a foreign corporation,

Petitioner,

v.

RAYMOND L. McDANIEL, *Respondent.*

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

CARLTON, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., Concur.

cc: Hon. Raymond Rhodes, Clerk
Hon. S. Morgan Slaughter, Clerk

Messrs. Kurz, Toole, Taylor, Moseley
Messrs. Horton, Schwartz & Perse
and Messrs. Beckham & McAliley
& Gabel

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By /s/ DAVE LANG, JR.
Chief Deputy Clerk
Supreme Court of Florida

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In the Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1658

SEABOARD COAST LINE RAILROAD COMPANY,
a foreign corporation,
Petitioner,

vs.

RAYMOND L. McDANIEL,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petitioner, Seaboard Coast Line Railroad Company, seeks review by petition for writ of certiorari pursuant to 28 U.S.C., § 1257, of the decision of the First District Court of Appeal of Florida, in *Seaboard Coast Line R. Co.* v. *McDaniel,* Fla.App. 1971, 254 So.2d 15, cert. den., Fla. 1972, 260 So.2d 517.

The decision affirmed a judgment entered by the Duval County, Florida, Circuit Court upon a jury verdict in favor of the respondent McDaniel and against his employer, the petitioner Seaboard, in an action under the Federal Employers Liability Act and the Safety Appliance Act against the Seaboard as McDaniel's employer. The single jury trial concerned two separate accidents sustained by McDaniel, on September 6, 1967, and July 31, 1968, respec-

tively, during the course of his employment as a switchman for the Seaboard at its yard in Waycross, Georgia. As described by the First District Court of Appeal in the decision sought to be reviewed here, at 254 So.2d 16:

> "On September 6, 1967, McDaniel, a veteran switchman, was assigned to a crew to uncouple three freight cars. A so-called 'flying switch' was involved in the movement of the freight cars. Two attempts to uncouple the cars to be switched failed. On the third attempt, the engine was able to 'run away' from the cars uncoupled which were accidentally cut onto the wrong siding, resulting in the 'cut cars' colliding with other cars on the sidetrack. As a consequence of the collision, McDaniel fell from the top of the car he was riding and was injured.
>
> "The second accident occurred on July 31, 1968. On that occasion the grab iron, attached to the locomotive which plaintiff was attempting to board, broke loose resulting in further injuries to plaintiff."

The decision affirming the jury verdict and judgment involved two holdings, both of which are challenged in this petition:

1. That, contrary to the contention of the railroad, there was, under any standard of proof,[1] no evi-

---

1. The petitioner's contention, at pages 3-4 of the Petition, that the Court of Appeal based this holding upon a "failure to recognize" whether F.E.L.A. standards of proof, as held in, e.g., *Page* v. *St. Louis Southwestern R. Co.*, 5 Cir. 1965, 349 F.2d 820, are applicable in the determination of the sufficiency of evidence to sustain a claim of contributory negligence, is entirely incorrect. In the Court of Appeal, McDaniel at page 9 of his Brief of Appellee, specifically acknowledged the correctness of the railroad's position on this point, but argued that, even under this standard, there was no evidence whatever of contributory negligence. It was *this* position which was adopted by the First District in its holding that there was, under any standard, no evidence of contributory negligence. As we shall see, there are many equivalent F.E.L.A. cases which so hold upon the distinctive facts presented in the particular case.

dence of negligence on the part of McDaniel to sustain the claim of contributory or comparative negligence against him involved in the first accident.[2] Hence, the trial judge was correct in "directing a verdict" for the plaintiff on this issue.

2. There was no essential distinction between the Federal-F.E.L.A. standards as to the recoverability of injuries sustained through the aggravation of a pre-existing condition, and the Florida rule on the subject as imposed in the Florida Standard Jury Instruction. Therefore, the trial judge did not err in giving the "standard" jury instruction, 6.2(b) in this F.E.L.A. action.

QUESTIONS PRESENTED

The railroad presents two questions for review by this Court which may be properly rephrased as follows:

1. Whether the trial judge and the District Court correctly determined that, on the particular facts revealed in the record as to the occurrence of the September 6, 1967 "flying switch" accident, there was no evidence of contributory negligence by McDaniel to justify the submission of that issue to the jury.

2. Whether the Florida Standard Jury Instruction on the subject of the aggravation of a pre-existing condition adequately or appropriately expresses the F.E.L.A. law on the subject so as to render proper its submission to the jury in this F.E.L.A. case.

---

2. The second accident involved a claim for recovery under the Boiler Inspection Act, 45 U.S.C., § 53, as to which contributory negligence constitutes neither a complete nor a partial bar to the plaintiff's recovery. No issue concerning the plaintiff's conduct in the second accident, therefore, has ever been raised in this proceeding.

ARGUMENT

The respondent McDaniel contends that neither question presented justifies certiorari review by this Court.

A. Sufficiency of Evidence of Contributory Negligence Presents No Basis for Discretionary Review.

It is perfectly obvious, of course, that the issue presented by question 1 concerning the sufficiency of the particular facts involved in the particular case to support the railroad's claim of contributory negligence in the "first" accident, presents no issue of general applicability which would justify review by this Court. In addition, the particular holding is in complete conformance with prior decisions of this Court and is entirely correct on the merits of the issue.

In sum, the record shows beyond question that the trial judge was correct in concluding that

> "There is no evidence of contributory negligence at all as far as the court can see." (ST. 4).

The railroad devotes much of the petition on this issue to arguing the proposition that the same standards of negligence and causal relationships applicable to support a claim of railroad liability under the F.E.L.A. apply in the consideration of the employee-plaintiff's contributory negligence. As there was below, see n. 1, there is no need to take issue with the railroad on this point, although its position does indeed seem to be correct. *Page* v. *St. Louis S. R. Co.*, 5 Cir. 1965, 349 F.2d 820. Even under these standards, the F.E.L.A. is not a Workmen's Compensation Statute imposing absolute liability for on-the-job-injuries, it requires evidence of negligence, including reasonable foreseeability between the alleged negligent conduct and the resulting injury, and a causal relationship—"in whole

or in part, however slight"—*between* the negligence *and* the injury. In many recent cases, the Supreme Court of the United States has emphasized the necessity of presenting evidence on each of these elements in order even to reach the jury on the issue of railroad negligence (and thus of employee contributory negligence) in a F.E.L.A. action. E.g., *Herdman* v. *Pennsylvania R. Co.*, 253 U.S. 518, 77 S.Ct. 455, 1 L.Ed.2d 508; *Inman* v. *Baltimore & O. R. Co.*, 361 U.S. 138, 80 S.Ct. 242, 4 L.Ed.2d 198; *New York N.H.&H. R. Co.* v. *Henagan*, 364 U.S. 441, 81 S.Ct. 198, 5 L.Ed.2d 183, reversing 1 Cir. 1960, 272 F.2d 153; *Gallick* v. *Baltimore & O. R. Co.*, 372 U.S. 108, 117, 83 S.Ct. 659, 9 L.Ed.2d 618, 626.

Applying these principles to the converse situation involved here, that of alleged contributory negligence many courts have ruled, as did the trial judge and the Court of Appeal below, that there was no basis upon which to submit a contributory negligence issue in a F.E.L.A. action to the jury. E.g., *Knierim* v. *Erie L. R. Co.*, 2 Cir. 1970, 424 F.2d 745, 747-748; *Palauch* v. *Erie L. R. Co.*, 3 Cir. 1968, 387 F.2d 996, 999; *Morran* v. *Pennsylvania R. Co.*, 3 Cir. 1963, 321 F.2d 402; *Chicago G. W. R. Co.* v. *Casura*, supra; *Moore* v. *A.T. & S.R.R. Co.*, 28 Ill. App.2d 340, 171 N.E.2d 393, 97 A.L.R.2d 511. These cases are directly applicable to a consideration of this record, which viewed in the light most favorable to the railroad, contains no evidence whatever that McDaniel was, even in the slightest, at fault in the September 7th switching accident.

The record shows conclusively that:

(a) McDaniel was standing in accordance with his instructions, in a proper position in a proper place riding on the brake step of the second car of the three car cut

(T. 22, 117). From that position he would have been able to "tie" the handbrake so as to stop the cut, had there been sufficient room on the track into which the cut was "accidentally" switched (T. 23).

(b) As the cut approached the switch, it was properly to have been switched onto track No. 3 (T. 117, 120-121, 151-153).

(c) It was only after he passed the switch, that McDaniel became aware of the fact that he had been accidentally switched onto track No. 1 where he himself had placed cars earlier that day (T. 117-118, 119-121, 151-153). The cars were placed only three to four car lengths from the switch (T. 23).

(d) In the short distance thus available, it was simply impossible to have stopped the cut of cars at the 20-25 mile per hour speed at which it was traveling (T. 22-24).

The collision thus resulted solely from the negligence of the other employees of the Seaboard who negligently operated the cut at the excessive speed, and switched McDaniel unknowingly onto a track in which there was insufficient space "in the clear" within which to avoid the collision. McDaniel was simply not at fault in failing to stop the cut when it was admittedly impossible to do so. The non-existence of a triable issue of McDaniel's negligence is forcefully demonstrated by the decision of this Court in the *Henagan* case, supra. There, this Court reversed a jury verdict and judgment for an employee injured on a train which had come to a sudden stop in order to avoid a suicide on the tracks, on the ground that, as a matter of law, there was no evidence of railroad negligence in failing earlier to observe the suicide near the tracks nor in failing to apply the brakes or stop the train sooner

than the crew actually did. At 5 L.Ed.2d 184, the Court held:

> "The train was pulling into petitioner's station at Providence, Rhode Island, for a scheduled stop. One Montell, apparently to commit suicide, stepped on the track from the station platform as the train approached alongside the platform. The engineer made the emergency application of the brakes in an unsuccessful effort to stop the train before it reached Montell. We have examined the trial record and hold that the proofs were insufficient to submit to the jury the question whether employer negligence played a part in the emergency application of the brakes which allegedly produced the respondent's injury. See Herdman v. Pennsylvania R. Co., 352 U.S. 518, 1 L.ed.2d 508, 77 S.Ct. 455."

This holding, under the railroad's own contention, applies equally to require a determination that the employee, McDaniel, was guilty of no negligence under identical circumstances. See also *Herdman* v. *Pennsylvania R. Co.*, supra; *Hoover* v. *Pennsylvania R. Co.*, 405 Pa. 642, 177 A.2d 98; Annot., 60 A.L.R.2d 637, 661-662, 666-667.

The railroad argues that the jury could have found McDaniel negligent in one or more of three different respects. None withstands analysis:

> (a) The railroad first contends that the jury could have found that the plaintiff could and should have stopped the cut prior to the collision. It is enough to say in response that there is no such evidence whatever in the record, which contains only Gordon's and McDaniel's specific testimony that the cut *could not be stopped in time.*

(b) Basing its claim on certain answers given by McDaniel in his deposition, which were used for impeachment purposes only, at the trial (see T. 151-153), the railroad next claims that there was evidence that the plaintiff—despite the specific and unequivocal testimony to the contrary (T. 117-118, 120-121, 151-153), should have known, before reaching the switch, that he was not to be switched onto track No. 3 but rather onto the occupied track No. 1.

First, since the deposition answers were used only in an attempt to impeach McDaniel's direct testimony as purported "prior inconsistent statements", it is clear that their contents—whatever they are—may not be employed substantively, or to serve any purpose other than effecting McDaniel's credibility. E.g., *Tomlinson* v. *Peninsular Naval Stores Co.*, 61 Fla. 453, 55 So. 548; *New York Life Ins. Co.* v. *Bacalis*, 5 Cir. 1938, 94 F.2d 200. The deposition statements thus may not even be considered on the question of whether a jury issue as to contributory negligence.

Even if they were so considered, however, they create no such issue. The statements at T. 151-153, McDaniel stated that track 3 was blocked by cars on track 2 and thus that neither track was clear (T. 151). However, and this is the key point, McDaniel specifically said that he determined that this was true *only after the accident* (T. 151). As he said at T. 151:

"Q And in this case, you knew that track 3 and track 2 were not clear; did you not know that?

A *I knew that after I hit.*"

It is perfectly apparent that the answers upon which the railroad relies related only to the knowledge McDaniel gained of the condition of the tracks McDaniel

gained *subsequent* to the accident. There is nothing whatsoever in the record even to impeach the clear and uncontradicted statements that he had no knowledge that he was headed toward track 1, until he passed the switch and it was too late to do anything about it (T. 119-121).

(c) Finally, the railroad contends that McDaniel might have been found negligent in riding on the brake step at the rear of the second car of the "cut", rather than the first one. Again, there was no evidence to sustain the claim. The record showed only that he was in a proper position to perform his job (T. 21), and there was no evidence of the vital element that he could or should have *reasonably foreseen* that an accident might occur as a result of his riding the second car, and not riding the first. See *Gallick* v. *Baltimore & O. R. Co.*, supra. Moreover, there is no evidence upon which the jury could have concluded that it made any causal difference upon which car McDaniel rode. No matter where he was, the evidence established that the collision would have taken place and could not have been avoided. All that would have occurred had he been on the first car was that the impact upon him would have been even greater, and his resulting injuries even more serious.

In sum, the record simply contains no evidence whatever that McDaniel did anything wrong or that his conduct contributed, even in the slightest, to the collision. The numerous cases cited, supra, which contain holdings of no F.E.L.A. contributory negligence as a matter of law, are thus directly in point. As was held in perhaps the most recent one, the *Knierim* case, supra, at 424 F.2d 747:

"The only claim against appellees Knierim and Cashin, who served as brakemen on the Passaic Drill,

is that they failed to make certain that the Passaic Drill had proper clearance to operate against traffic. Before the Passaic Drill left the Manhattan Rubber Company for the Continental Can Company siding, Fitchik, who as conductor was primarily responsible for the safety of the train, had undertaken to flag oncoming trains and to call the dispatcher to obtain clearance for the moves of the train. Appellees had no reason to anticipate that Fitchik would fail to perform properly these duties which were primarily his responsibility, as the man in charge of the crew, rather than theirs. To require a railroad employee to act at his peril in relying on a superior's undertaking to perform a particular task would be inimical to the purpose of the FELA. Cf. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 66-67, 63 S.Ct. 444, 87 L.Ed. 610 (1943). Knierim and Cashin must be held to have acted prudently in relying on their superior's express representations that he would protect and clear the train's movements. See Paluch v. Erie Lackawanna R. Co., 387 F.2d 996, 999 (3rd Cir. 1968)."

See also *Mumma* v. *Reading Co.*, E.D. Pa. 1965, 247 F.Supp. 252, 254-259.

On the other hand, the case heavily relied upon by the railroad, *Matthews* v. *A. T. & S. F. R. Co.*, Cal.App. 1942, 129 P.2d 435, 439-440, is manifestly *not* in point. There the appellate court simply rejected the railroad's claim that the employee had been guilty of contributory negligence *as a matter of law*. In that case, only the plaintiff testified that his cut had been switched onto an occupied track in which he had insufficient room to stop; every other crew member stated that he had been switched onto an open track and that a collision occurred only because of his own negligence. Even under these circum-

stances, the court held only and properly that contributory negligence was for the jury. *This record*, however, contains no contradictions at all concerning the circumstances of the accident or the fact that, as the trial judge properly found, McDaniel was not guilty of any negligence which was a cause of the collision. Accordingly, as in the many cases cited, supra, under the F.E.L.A., the trial judge and the Court of Appeal were entirely correct in determining that the contribtuory negligence issue could not properly be submitted to the jury.

B. Holding As to Propriety of Florida Instruction on Aggravation Presents No Basis for Discretionary Review.

The second question presented by the railroad likewise presents no basis for review by certiorari. The challenged holding of the District Court that the F.E.L.A. law as to the recoverability of damages for the aggravation of a pre-existing condition by an accident for which the railroad is liable, was entirely in accordance with the applicable decisions of this Court and of the Courts of Appeal, and was thus entirely correct.

There was abundant evidence in the record on the damage issue concerning the aggravating and activating effect of the injuries McDaniel received in the accidents in question upon his pre-existing mental and physical condition. One of the Railroad's own witnesses testified, for example, that the accidents were, or may have been, the "straw that broke the camel's back" (T. 267-286), resulting in a single condition of extensive disability subsequent to the second accident. In accordance with this testimony, the trial judge instructed the jury concerning the responsibility of the Railroad to respond in damages for the results of an aggravation of a pre-existing condition (T. 365,

366). On appeal, the Railroad did not claim error in submitting the issue to the jury. It claimed, however, that the *language* of the Court's instruction on the issue was incorrect. The trial judge in fact instructed the jury on "aggravation" in accordance with the Florida Standard Jury Instruction 6.2(b). That instruction stated:

> "Also, you should consider any aggravation of an existing disease or physical defect or activation of any such latent condition, resulting from such injury. If you find that there was such an aggravation, you should determine, if you can, what portion of plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition." (T. 365-366).

The railroad argues that the last sentence of this instruction was incorrect under the F.E.L.A., and should have been replaced, by the following sentence in defendant's requested instruction No. 11:

> "The Plaintiff is not entitled to recover for damages which would have resulted from his previous condition without the aggravation." (R. 112).[3]

The thrust of the instruction as given by the trial judge is to hold the defendant railroad responsible for the "entire" resulting condition of an injured employee, if its negligence has aggravated a *pre-existing* condition, and the

3. It is difficult to determine that there is any real, rather than semantic, difference between the requested instruction and that given by the Court. It is difficult, therefore, in turn, to determine how the railroad was harmed by the refusal of its "requested" instruction and the submission of the Standard Jury Charge on this issue.

resulting one would not have otherwise occurred—if, in other words, the accident in question was a cause, in part, of a subsequent "indivisible" injury. It is difficult, first of all, to understand how the actual instructions essentially differed from the one supposedly submitted by the defendant. There is no suggestion in the Standard Jury Instructions that the plaintiff *would* be entitled to recover for any damages which he would have sustained if the pre-existing condition had not been aggravated; the requested instruction would merely have negatively informed the jury that it should *not* award damages for injuries which the defendant did not cause, in whole or part. There was clearly no error in declining to instruct the jury on such a negative proposition. E.g., *Atlantic Coast Line R. Co.* v. *Braz,* Fla.App. 1966, 182 So.2d 491, 495.

In any event, the instruction was a proper statement of the F.E.L.A. law of damages.[4] As the Railroad itself points out, the F.E.L.A. test of requisite causation involves merely the question of whether the railroad's negligence played "any part, even the slightest" in producing the injuries complained of. E.g., *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493. The aggravation instruction, which stated that the railroad was responsible for the entire condition, as aggravated, if its negligence contributed to that single condition and the condition would not otherwise have existed, represents no more than a particular application of this rule. As this Court held in *Gallick* v. *Baltimore & Ohio R. Co.,* 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618, 623:

4. The railroad's claim that the common law of Florida is more "liberal" and less "restrictive" than the F.E.L.A. must be unique in the history of F.E.L.A. litigation. See the District Court's decisions in *Gaymon* v. *Quinn Menhaden Fisheries of Texas, Inc.,* Fla.App. 1960, 118 So.2d 42, 44, and *McCloskey* v. *Louisville & N. R. Co.,* Fla.App. 1960, 122 So.2d 481, 483.

". . . And we have no doubt that under a statute where the tortfeasor is liable for death or injuries in producing which his 'negligence played any part, even the slightest' (Rogers v. Missouri Pacific R. Co., 352 US 500, 506, 1 L ed2d 493, 499, 77 S Ct 443) such a tortfeasor must compensate his victim *for even the improbable or unexpectedly severe consequences of his wrongful act.* Cf. Kernan v. American Dredging Co., 355 US 426, 2 L ed 2d 382, 78 S Ct 394; Coray v. Southern Pacific Co., 335 US 520, 93 L ed 208, 69 S Ct 275; Lillie v. Thompson, 332 US 459, 92 L ed 73, 68 S Ct 140. . . ." (Emphasis supplied)

There can be no doubt that the "in whole or in part" rule is in fact applicable to the results of the negligence of the railroad in aggravating a prior condition. See *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (aggravation of preexisting latent tubercular condition). This is forcefully demonstrated by the fact that jury instructions on this subject indistinguishable from those given below, have been specifically upheld and approved in F.E.L.A. actions. Thus, in *Butler* v. *New York Central R. Co.*, 7 Cir. 1958, 253 F.2d 281, 283-284, cited by the District Court here, the Court held:

"The defendant complains of Instruction No. 29 which reads as follows:

'If you find for the plaintiff, and if you further find from the evidence that the plaintiff had a congenital weakness in his mind which has never caused him any inability to work or take care of his family and has never interfered with his activities or manner of living before the accident complained of, but that as a proximate result of the negligence of the defendant he suffered the injuries of which he now

complains, I charge you that he is entitled to recover full compensation for these injuries, even though the result of said injuries may be more serious and far-reaching because of the congenital weakness in his mind, and even though his particular injuries might have been less, except for the congenital weakness of his mind.'

The defendant objected to this instruction for the reason that 'it would permit a recovery on the part of plaintiff for any and all damages and would permit a recovery in this case, whereas the evidence most favorable to plaintiff could only show the aggravation of a present existing condition and this would permit recovery of a condition which existed prior to and not confined solely to the damages which would flow from the aggravation'.

The defendant's contention that this instruction permitted a recovery 'for a congenital weakness in plaintiff's mind holding defendant liable for injuries that were not the proximate result of its alleged negligence' is without merit because the instruction says no such thing. The instruction is most awkwardly drawn. As worded it was neither beneficial to the plaintiff nor harmful to the defendant. It informed the jury that the plaintiff was entitled to recover, if at all, for the injuries suffered as a proximate result of the negligence of the defendant whether such injuries be more or less serious because of the possible congenital weakness of his mind. In our opinion the objection of the defendant was not well founded.

Under the Federal Employer's Liability Act, the test of a jury case is whether the proofs reasonably justify the conclusion that the employer's negligence

> played any part, however slight, in producing the employee's injury. Rogers v. Missouri Pacific Railroad Co., 1957, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493; Webb v. Illinois Central Railroad Co., 1957, 352 U.S. 512, 77 S.Ct. 451, 1 L.Ed.2d 503; Arnold v. Panhandle & S.F.R. Co., 1957, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889."

See also *Rank* v. *Alaska Steamship Co.*, Wash. 1954, 274 P.2d 583 (Jones Act defendant which aggravates pre-existing condition liable for "entire injury"); *Kirchgestner* v. *Denver & R.G.W.R. Co.*, Utah 1950, 213 P.2d 685.

The cases cited by the railroad on this issue do not sustain its contention. In *Shupe* v. *New York Central System*, 7 Cir. 1965, 339 F.2d 998, the sole issue did not involve "aggravation" at all, but rather whether the Plaintiff's damages were shown to have resulted from a F.E.L.A. accident to his shoulder, after which he worked for 10 months, rather than from an entirely separate non-F.E.L.A. back injury which he then sustained, and after which he did not work at all. The Court held that there was an insufficient showing that the Plaintiff's damages had resulted from the F.E.L.A. accident. In *Matthews* v. *Atchison, T. & S.F. R. Co.*, Cal.App. 1942, 129 P.2d 435, the Court held at 129 P.2d 443:

> ". . . And he has the burden of proving with reasonable certainty that his future disability for which he claims damages will be the result of the aggravation *rather than the natural development of the previous condition.*" (Emphasis supplied).

This statement is fully in accord with the instructions given below, under which the plaintiff could not have recovered if his injuries resulted merely from the unaggravated "development of his previous condition".

REASONS FOR DENYING PETITION

The petition for writ of certiorari should not be granted because

1. The decision below does not decide a question of real substance or of broad applicability; it determined, as to question 1, only the sufficiency of the evidence in a particular factual setting, and, as to question 2, only the propriety of what was at best a miniscule semantic distinction between the particular jury instruction submitted to the jury and that requested by the petitioner.

2. The federal questions concerning the sufficiency of the evidence and the propriety of the jury instruction were decided entirely in accordance with prior determinations of this Court as to analogous, if not identical, situations and questions.

CONCLUSION

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief was mailed to Petitioner herein by placing same in the United States mail, properly addressed, postage prepaid, on this, the 21st day of July, 1972, to KURZ, TOOLE, TAYLOR, MOSELEY & GABEL, 1014 Barnett Bank Building, Jacksonville, Florida 32202.

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